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EMPLOYMENT PRACTICES LIABILITY INSURANCE AND THE CHANGING AMERICAN WORKPLACE

FOREWORD

In the past fifteen years there has been substantial insurance coverage litigation as employers have attempted to secure coverage under their liability insurance program for employment-related practices liabilities. In recognition of this significant development of a body of law, and growing out of an American Bar Association Annual Meeting panel discussion in which I participated, the *Western New England Law Review* published a Symposium in 1996 entitled, *Insurance Coverage of Employment Disputes*.¹ Employers continue to seek insurance coverage for these liabilities under their traditional liability insurance policies, but the situation has dramatically changed in the past several years. On the one hand, insurers have almost uniformly adopted exclusionary language in general liability policies to preclude coverage for these claims; on the other hand, approximately eighty insurance companies are now aggressively competing to market an insurance product designed specifically to cover this risk: Employment Practices Liability Insurance ("EPLI"). Therefore, only three years later it is necessary to revisit this area of law with another Symposium issue.

The Articles in this Symposium originated as presentations made as part of a full-day program on EPLI sponsored by the Professional Liability Underwriting Society ("PLUS"). The program

1. 18 W. NEW ENG. L. REV. 1-269 (1996).

took place on March 2, 1999 in New York City before an overflow crowd of insurance professionals and lawyers. The theme of the program, despite the diversity of the speakers, was the rapid pace of changes in this area of insurance coverage. With this Symposium issue, the *Western New England Law Review* brings together the insight and experience of insurance professionals, claims counsel from insurance companies, employment lawyers, a risk management consultant, and law professors to address this dynamic and challenging segment of the insurance marketplace.

In the first two Articles, the authors describe the continuing efforts by employers to secure insurance coverage under traditional liability insurance products. In their contribution, Joe Monteleone and Emy Grotell discuss the coverage questions that arise under Commercial General Liability Policies, Excess Liability Policies, Homeowners' Liability Policies, Workers' Compensation/Employers' Liability Policies, and Directors' and Officers' Liability Policies. Joe and Emy concentrate their discussion on the most recent cases in the area, thereby providing an update of the Articles in the 1996 Symposium. As claims counsel to insurance companies, one would expect that their analysis would be heavily biased against coverage; however, the authors provide a balanced and sophisticated reading of these recent cases. Jeff Stempel's Article provides an in-depth analysis of the New Jersey Supreme Court's recent decision that public policy requires Employers' Liability policies to provide coverage for claims of bodily injury arising out of sexual harassment, notwithstanding express policy exclusions to the contrary. Although Jeff has a reputation in his scholarly writing for advocating positions that expand coverage available to insureds, in this Article he criticizes the New Jersey Supreme Court's opinion. Jeff offers a nuanced reading that distinguishes the court's retrograde interpretive approach from the progressive and pro-policyholder result of the verdict and concludes with some suggestions for how insurers might satisfy the public policy mandate announced by the court in a principled and sensible manner.

A primary reason that employers turned to existing liability policies to obtain coverage for employment-related practices liabilities was the relative unavailability, narrow coverages, and high premiums of EPLI products during the early 1990's. In the next Article, Jeff Klenk describes the tremendous expansion during the past several years in the coverage provided by EPLI policies. Jeff is well-positioned to report these changes, since he was the EPLI product manager at Executive Risk Insurance at the time that Ex-

ecutive Risk was a leader in the effort to design broader and more cost-effective coverage in EPLI policies. Jeff is currently the Senior Vice President responsible for Professional Liability for the Bond division of Travelers Property Casualty.

The following two Articles emphasize the instability of employment law that makes insuring these liabilities particularly difficult. Steve Badarian, Elise Bloom, and Valerie Wilde describe the recent flurry of Supreme Court opinions on sexual harassment and describe the kind of proactive strategies that employers must adopt to avoid liability. Their Article serves as a reminder that the liabilities being underwritten by EPLI carriers are far from settled, and also highlights the tremendous importance of risk management and loss control. In the next Article I also emphasize the changes in the law regarding employer liability for hostile work environment sexual harassment and argue that these changes may have significant effects on the EPLI market. I argue that the apparent movement to a negligence rationale for imposing liability on employers for hostile work environment sexual harassment may make coverage more likely under general liability policies and Employers' Liability policies, and also that this shift may make it very unlikely that insurance coverage for these liabilities will be denied for reasons of public policy.

The last two Articles in the Symposium address what may be the most significant effect of the widespread purchase of EPLI: the development of sophisticated loss control and risk management techniques that can be packaged by insurers for cost-effective implementation by smaller employers. Brian McMillan describes a number of strategies that employers may use to avoid claims and to minimize the losses associated with claims. In the past, Brian's expertise as a lawyer representing employers would have been reserved for large or sophisticated businesses able to pay private law firm rates, but as insurers align with large defense firms to design their risk management and loss control programs this will no longer be the case. Jack McCalmon's Article assesses the variety of loss control measures available to insurers, including the growing use of interactive web technology, toll-free advice lines, and other emerging techniques. Jack concludes his Article with a chart that grades the various techniques based on his years of experience as an employment lawyer and his current position as a consultant to employers and insurance companies.

The Symposium reflects the sea-change that has occurred in the insurability of employment-related liabilities over the past five

years. The primary question no longer is whether these liabilities are covered by general liability products. Instead, with the widespread emergence of EPLI, the questions now focus on the effects that insurance coverage will have on the behavior of employers and third-party claimants, and the challenges facing EPLI carriers as they attempt to deal with the unpredictable risk of employment-related losses. Perhaps the only conclusion that can safely be drawn at this time is that there is likely to be a need to organize another Symposium on the topic within the next five years.

There are a number of people who made this Symposium possible. When I contacted Joe Monteleone to discuss the need to update the earlier Symposium, he used his position as a trustee of PLUS to arrange for a full-day program on the topic. I would also like to thank Jeff Klenk who chaired the PLUS event and who shared his industry expertise with me. Moreover, I would like to thank all of the authors for graciously agreeing to revise their talks for publication in a law review format. Finally, Dean Dunn has encouraged this project and provided financial support, and Professor Leora Harpaz has worked as the Law Review advisor to ensure that the publication schedule was met.

I reserve the most important expressions of gratitude for the staff of the Law Review. Former Editor-in-Chief, Don Marchesault, suggested the idea of putting together a Symposium while he was a student in my insurance law class, and he worked tirelessly to make the Symposium a reality. Don's efforts would have been in vain, though, if not for the dedication of the incoming board members who worked diligently during the summer months to prepare the Articles for publication. Justin Dion (Editor-in-Chief), Marie Kuban (Managing Editor) and Karey Pond (Articles Editor) provided the leadership to make this happen, but it truly was a team effort. Finally, Carmen Alexander provided word-processing support with her usual smile and enthusiasm.

Francis J. Mootz III